No. 12,250

IN THE

United States Court of Appeals

For the Ninth Circuit

VIRDIE SCHIEL, FRANK SCHIEL, SR., MARY LOU SCHIEL and LORRAINE SCHIEL,
Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Appellee.

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

So that the Court will have a clear cut picture of the proceedings in the District Court, we deem it necessary to briefly supplement appellants' statement of the case.

The issue of reformation raised by appellee's complaint and appellants' answer was decided by the District Court upon a stipulation of facts (R. 41). The Court made

findings of fact and conclusions of law (R. 49) and on September 12, 1945 entered judgment as follows:

"The Court having heretofore made and entered its Findings of Fact and Conclusions of Law in the above-entitled matter, now, therefore, by reason of the law and the findings aforesaid

"IT IS ORDERED, ADJUDGED AND DECREED that Policy No. 12,666,606 issued by New York Life Insurance Company, a corporation, plaintiff herein, to Frank Schiel, Jr., the insured, be and the same is hereby reformed and corrected to evidence the true agreement between plaintiff and the insured by having endorsed on said policy and incorporated therein as part thereof the following:

PERMANENT AVIATION CLAUSE

Anything in this Policy to the contrary notwithstanding, the death of the Insured as a result directly or indirectly from operating or riding in any kind of aircraft whether as a passenger or otherwise, other than as a fare-paying passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and operated by a licensed pilot on a regular passenger route between definitely established airports, is a risk not assumed under this Policy, but upon receipt of due proof of the death of the Insured, as a result directly or indirectly from operating or riding in any kind of aircraft whether as a passenger or otherwise (other than as a fare-paying passenger as defined above) the Company will pay to the beneficiary in lieu of the amounts provided in this Policy, the reserve on the face amount of this Policy at the date of death, and the reserve on any outstanding dividend addi-

tions, and any outstanding dividends, including dividend deposits, less any indebtedness to the Company against this Policy.

NEW YORK LIFE INSURANCE CO.

New York, March 29, 1939 FREDERICK M. JOHNSON
Secretary

DONE in open Court this 12th day of September, 1945

DAVE W. LING
Judge of District Court''

(R. 53)

No appeal was taken from the judgment.

Thereafter, appellants filed their second amended cross-complaint whereby they sought recovery of $5,000.00 representing face amount of the life insurance policy for which reformation had been adjudged (R. 54). Appellee interposed an answer alleging that the death of the insured fell within the provisions of the aviation clause and that appellants therefore were entitled only to the reserve on the policy in the amount of $448.80 (R. 57).

Appellee took the depositions of Major Clark Marshall of the United States Army for the purpose of establishing the cause of insured's death and the same was duly filed herein (R. 86). Appellee also secured and filed the affidavit of Charles W. V. Meares, Secretary of appellee for the purpose of establishing the amount of the reserve upon the policy at the time of insured's death (R. 60). An affidavit of appellant Frank Schiel, Sr. was filed in the cause, presumably for the purpose of casting doubt upon the accuracy of the records of the War Department (R. 62).

The affidavit was based on hearsay, did not disclose the existence of any competent evidence which would impugn the *prima facie* effect of the War Department records attached to the deposition of Major Marshall and was not in substance and form as required by Rule 56(e) of the Rules of Civil Procedure. The official Report of Death disclosed that the insured died on December 5, 1942 as a result of "injuries incidental to airplane crash. Direct cause of death fracture of skull, multiple fracture of the long bone." An extract from the official Squadron history of the 74th Squadron, 23rd Fighter Group reads:

> *December 5*
>
> Major Schiel*d* and Major Schwartz took off in P-38's today on a reconnaissance mission. Major Schwartz made a forced landing at Eweiyang after becoming separated from Major Schiel. The latter was found some days later, His plane had apparently crashed full speed into the si*ed* of a mountain, southeast of Kunming, and burst into flame." (R. 100)

On November 5, 1948 appellee filed a motion for summary judgment pursuant to Rule 56(b)(c) of the Rules of Civil Procedure for the reason that "the pleadings, depositions and affidavits on file herein show that there is no genuine issue as to any material fact" (R. 59). The District Court granted the motion (R. 66), made findings of fact and conclusions of law (R. 66), and on March 9, 1949 rendered judgment as prayed for by appellee, namely, that appellants have and recover from appellee only the sum of $448.80 representing the reserve on the policy (R. 70). This appeal followed.

SUMMARY OF ARGUMENT

I.

The judgment of reformation entered on September 12, 1945 was final and appealable. This Court does not now have jurisdiction to review the same.

II.

Should this Court conclude that the judgment of reformation is open to review:

(a) Appellee had the right to insist upon the inclusion of the aviation clause as a condition to reinstatement.

(b) Reformation of the policy was not precluded by the clause making it incontestable after two years from its date of issue.

(c) The policy provision that it and the application "constituted the entire contract" does not preclude reformation.

(d) By reason of mutual mistake of the parties reformation was required in order to express the true agreement.

III.

Appellee was entitled to summary judgment for the reasons:

(a) The pleadings, depositions and affidavits on file disclose that there is no genuine issue as to any material fact.

(b) The aviation clause limited the risk assumed by appellee with respect to military as well as civilian aviation.

ARGUMENT

I.

Judgment of Reformation Not Open for Review

By its complaint appellee sought reformation of the contract of insurance. Such relief was available under the equity jurisdiction of the District Court. By their cross-complaint the appellants invoked the common law jurisdiction of the Court to recover the face amount of the policy. It was necessary that the Court first exercise its equitable jurisdiction for the purpose of determining the true contract between the parties. Thereafter—assuming the existence of a genuine issue of fact—appellants were entitled to a trial of their common law claim. Rule 42(b) of the Rules of Civil Procedure reads as follows:

> "Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues."

Rule 54(b) of the Rules of Civil Procedure (prior to 1946 amendment) reads:

> "Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall determine the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so

entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

Under authority of the Rules above quoted, the District Court entered upon a determination of the equitable issue raised by the complaint, based upon a stipulation of facts. Judgment of reformation was entered on September 12, 1945. The judgment was final and appealable.

In the case of *Bruckman v. Hollzer,* C.C.A. 9, 152 Fed. 2d 730, this Court recognized that in an action where both equitable and common law claims were asserted, they should be separately disposed of. That the judgment entered herein upon the equitable issue was final and appealable is decided by this Court's ruling in *Hanney v. Franklin Life Ins. Co.,* C.C.A. 9, 142 Fed.2d 864. In that case the amended complaint contained two counts, the first of which attempted to state a claim on the policy as written. The second sought reformation. The District Court entered judgment dismissing the first count, and an appeal was taken to this Court. Appellee moved to dismiss the appeal upon the ground that the judgment appealed from was not final. The motion was denied upon the ground that the two counts involved distinct claims. In making its decision this Court relied upon *Reeves v. Beardall,* 316 U.S. 283, 62 Sup. Ct. 1085, 86 L.Ed. 1478, 1479, wherein the Supreme Court stated:

"That rule (54(b)), the joinder provisions (see Rules 13, 14, 18, 20) and the provision of Rule 42 which permits the court to order a separate trial of

any separate claim or issue indicate a 'definite policy' (Collins v. Metro-Goldwyn Pictures Corp. supra ((CCA 2d) 106 F(2d) p. 85) to permit the entry of separate judgments where the claims are 'entirely distinct.' 3 Moore, Federal Practice, Cum. Supp. 1941, p. 96. Such a separate judgment will frequently be a final judgment and appealable, though no disposition has been made of the other claims in the action. Bowles v. Commercial Casualty Ins. Co. (CCA 4th) 107 F(2d) 169, 170. That result promotes the policy of the Rules in expediting appeals from judgments which 'terminate the action with respect to the claim so disposed of,' though the trial court has not finished with the rest of the litigation. See Federal Rules of Civil Procedure, Proceedings of Institutes, Washington & New York (1938), p. 329.

The Rules make it clear that it is 'differing occurrences or transactions which form the basis of separate units of judicial action.' Atwater v. North American Coal Corp. (CCA2d) 111 F(2d) 125, 126. And see Moore, op. cit., 92-101; 49 Yale L.J. 1476. If a judgment has been entered which terminates the action with respect to such a claim, it is final for purposes of appeal under Sec. 128 of the Judicial Code.''

The application of the *Reeves* decision in the *Hanney* case of necessity required the conclusion that a claim for reformation and a claim on the contract are ''entirely distinct'' and that they arise out of ''differing occurrences or transaction.'' The same is true of the case at bar. It is clear that the transaction or occurrence upon which appellee's claim was bottomed was the mutual mistake of the parties. The transaction or occurrence upon which

the cross-complaint was based was the death of the insured. The evidence in support of one claim was entirely different from that which would be adduced in support of the other. There was no issue of law or fact common to both.

The time within which appellants could have sought review by this Court of the judgment of reformation expired at the end of three months following entry thereof, namely, on December 12, 1945. 28 U.S.C.A. 230. It is elementary that this Court now does not have jurisdiction to review that judgment.

Hill v. Chicago and Evanston Ry. Co., 140 U.S. 52, 11 Sup. Ct. 690, 35 L.Ed. 331;

Lamb v. Shasta Oil Co., C.C.A. 5, 149 Fed.2d 729.

II.

Reformation Properly Allowed

Although we are confident that this Court lacks jurisdiction to review the judgment of September 12, 1945, we submit—in the event this Court decides that such judgment is reviewable—that the District Court did not err in entering such judgment.

A. INCLUSION OF AVIATION CLAUSE AS CONDITION OF REINSTATEMENT.

Appellants argue that appellee had no right to insist upon the inclusion of the aviation clause as a condition to reinstatement. The policy provides:

> "This policy may be reinstated at any time within five years after any default, upon presentation at the Home Office of *evidence of insurability satisfactory to the Company* and payment of overdue premiums with interest at six per cent per annum there-

on from their respective due dates." (Emphasis supplied) (R. 9).

The Supreme Court of Arizona has held in the case of *Equitable Life Assur. Soc. of United States v. Pettid,* 40 Ariz. 239, 11 P.2d 833, that under a reinstatement clause similar to that above quoted the insurer may require as a condition to reinstatement, evidence of insurability satisfactory to it, not only with respect to conditions of health but as to other conditions also material to the risk. The Court said:

> "It is urged by plaintiff, and apparently the trial court gave some weight to her contention, that, since there was evidence in the record showing that the insured was in good health at the time of his death, the furnishing of the certificate of health was immaterial. The answer is that the condition of the policy in regard to reinstatement was not merely that insured should be in good health, but that, as a condition precedent to reinstatement, he should furnish evidence, not merely of good health, but of insurability to the satisfaction of defendant, a matter involving other elements than personal good health." (11 P.2d 839.)

In the case of *Kansas City Life Ins. Co. v. Phillips,* 31 Ariz. 122, 250 P. 882, 884, the Supreme Court of Arizona stated:

> "The hereinbefore quoted parts of the application for reinstatement show an agreement as to when a lapsed policy would be considered reinstated. Under it the filing with the insurer of an application to be reinstated, and the payment of the past-due premiums, are not enough. These are only preliminary

steps, and, after receiving them, insurer has a right to satisfy itself as to the character of the risk and whether it has been changed or become more hazardous than when the policy was issued."

It is clear that appellee had the right—in view of insured's disclosure that he intended to engage in military aviation (R. 19)—to decline reassumption of a risk which had become more hazardous, and that appellee could have unconditionally rejected the application for reinstatement. Had such action been taken, it would not have been subject to review by the courts. The Supreme Court of California points out:

"The contract in question clearly provides, as above stated, that what shall constitute 'satisfactory evidence' is a question for the company to determine. It is purely a private matter addressed to the discretion of those officers of the company charged with the responsibility of determining such question, and is in no sense that judicial discretion which appellate courts have the authority to review. In the final analysis, whatever the word 'insurability' means, the contract provides that the evidence thereof must be 'satisfactory to the company.' That question having been determined by virtue of and according to the clear and unequivocal terms of the agreement, there is nothing, under the circumstances presented herein, for judicial determination." (Greenberg v. Continental Casualty Co., 24 Cal. App. 2d 506, 75 P.2d 644, 649.)

Accord:

Lanier v. New York Life Ins. Co., C.C.A. 5, 88 Fed.2d 196;

Kirby v. Prudential Ins. Co. of America, 191 S.W.2d 379 (Kan.);

Kallman v. Equitable Assur. Soc. of United States, 288 N.Y. Supp. 1032, aff'd 272 N.Y. 648, 5 N.E.2d 375 (N.Y.).

As appellee had the right to refuse reinstatement completely, it follows that it could elect to offer reinstatement upon any condition it wished to impose. In this case the effect of appellee's action was to reject the application to reinstate the policy as written and to offer a new policy —one that included the aviation clause. This offer was accepted by the insured.

B. REFORMATION WAS NOT PRECLUDED BY THE INCONTESTABLE CLAUSE.

In support of their contention that the incontestable clause precluded reformation, appellants cite the opinion of this Court in *Richardson v. Travelers Ins. Co.,* C.C.A. 9, 171 Fed.2d 699. We respectfully submit that the rule announced in the *Richardson* case is erroneous and should be expressly overruled. The opinion of Judge Orr, concurred in by Judge Healy—Judge Bone dissenting—is directly contrary to the rule adopted by five very respectable appellate courts with no judges dissenting.

Buck v. Equitable Life Assur. Soc. of United States, 96 Wash. 683, 165 Pac. 878;

Columbian Nat. Life Ins. Co. v. Black, C.C.A. 10, 35 Fed.2d 571, 71 A.L.R. 128;

Equitable Life Assur. Soc. of United States v. Rothstein, 122 N.J. Eq. 606, 195 A. 723; aff'd 199 A. 43;

Mates v. Pennsylvania Mutual Life Insurance Co., 316 Mass. 303, 55 N.E.2d 770;

American Nat. Ins. Co. v. McPhetridge, 28 Tenn. A. 145, 187 S.W.2d 640.

That two judges have one opinion and thirty-five (30 appellate and 5 *nisi prius*) judges of presumably equal sagacity hold to the contrary does not, purely by weight of numbers, prove the two to be wrong. The great disparity between the advocates of pro and con does, however, justify a careful scrutiny of the reasoning of the minority.

In reaching his conclusion Judge Orr decides *in limine:*

(a) The term "policy" in the incontestable clause does not refer to the agreement which the parties intended (which through mutual mistake they failed to accurately express in the writing) but rather to the writing which purports to embody the agreement.

(b) "Mistake" like "fraud" is an "inception defense" and because the incontestable clause bars one it must bar the other.

For the purpose of analyzing Judge Orr's reasoning, let us pose an example: Assume (a) that the parties wish to make a contract, the original draft of which contains an incontestable clause; (b) that one of the parties objects to the clause and upon discussion it is agreed that it will be deleted; (c) that the typist inadvertently includes the clause in the final draft; (d) that the parties sign the final draft without noticing the inclusion of the incontestable clause; and (e) that one of the parties seeks reformation of the writing, such reformation to include deletion of the incontestable clause.

By the application of Judge Orr's reasoning, it will be decided that the contract can not be reformed by deleting the incontestable clause. Since the incontestable clause is valid and binding until deleted by reformation, it therefore precludes its own removal because to challenge the clause would be to contest the valid contract. As Judge Orr states it:

> "Assuming that the mistaken provision in the absence of an incontestable clause, could be reformed, nevertheless, it along with the remainder of the provisions constituted a contract which bound the parties until rescinded, reformed or otherwise modified. See, Berenson v. French, 262 Mass. 247, 159 N.E. 909; Williston on Contracts, Sec. 15. For this reason it cannot properly be assumed that the document embodying the policy is invalid, and therefore argued that the incontestable clause has no effect on an action to reform the policy." (Richardson v. Travelers Ins. Co., 171 Fed.2d 699, 701)

Judge Orr overlooks the fact that although the writing may be treated, and given effect, as a valid contract at law even though it does not express the true intent of the parties, the writing will not be treated, or given effect, as a valid contract in equity. Thus the problem found in our example is solved—when it appears that the writing does not express the intent of the parties, equity gives no force to its provisions and proceeds to reform the writing to the end that it will represent the true agreement of the parties. Equity has no difficulty in ignoring the incontestable clause because the parties never intended that it be a part of the contract. Furthermore, in equity the term "contract" (or "policy", if you please) as used in the

incontestable clause, and which is not to be contested, can refer only to the true agreement of the parties and not to the writing which is not the "contract" of the parties.

An analogous situation is presented when reformation of an insurance policy is sought in the face of a statutory or contractual provision that the policy constitutes the entire contract. Such a clause forms a more reasonable basis for an argument against reformation than does an incontestable clause. The former in effect says "you shall not go outside this writing to find the intent of the parties." The incontestable clause merely says "you shall not challenge the validity of the contract." If equity can ignore the former it must certainly ignore the latter. In the case of *American Merchant Marine Ins. Co. v. Tremaine,* C.C.A. 9, 269 Fed. 377, Judge Gilbert, speaking for this Court stated:

> "We think that the statute has no relation to the subject-matter of the present suit. This is not a case of the construction of an insurance contract. The appellant is not here attempting to assert rights under the contract. It is here seeking to reform the written expression of the contract as found in the policy, and have it set forth the true agreement upon which the minds of the contracting parties had met, and had expressed in writing, and which by accident and mistake had not been included in the policy. The effort is to let into the contract something entirely distinct from the sense and construction thereof. The statute was clearly never intended to stand in the way of the reformation of insurance policies, or to curtail a power which is everywhere conceded to courts of equity.

> Many states have adopted similar statutes, the object whereof is to require that the whole agreement between the insurer and insured shall be expressed in the policy. But in so legislating there is no denial of power to reform contracts of insurance. To provide that, if a copy of the application is not delivered to the assured, it shall not become a part of the contract, is not to say that a court of equity may never correct a mutual mistake after the policy is delivered."

It logically follows from Judge Gilbert's opinion that no statement or restriction in a writing will be recognized as a bar to reformation if demanded by equity. In accord:

City of Lawrenceburg v. Maryland Casualty Co., 16 Tenn. A. 238, 64 S.W.2d 69; and

North Carolina Mut. Life Ins. Co. v. Martin, 223 Ala. 104, 134 S. 850.

Judge Orr begs the question when he states that mistake, like fraud, is an "inception defense"—"the very objects for which the incontestable clause was originated." This is but to say that the clause was inserted to preclude rescission for fraud or reformation for mutual mistake. Such assumption as to the motive which prompts insertion of the clause is obviously an unsound basis for a conclusion which does violence to the purpose as expressed in the clause. That purpose is to eliminate any question as to the *validity* of the policy after the expiration of the contestable period.

Burns v. Mutual Ben. Life Ins. Co., D.C. Mich. 79 Fed. Supp. 847;

Posner v. New York Life Ins. Co., 56 Ariz. 202, 106 P.2d 488;

Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449, 169 N.E. 642;

New York Life Ins. Co. v. Veit, 294 N.Y. 222, 62 N.E.2d 45.

The defense of fraud does, of course, question the validity of the contract entered into by the parties. An action for reformation based on mutual mistake does not. The statement made by the 10th Circuit in the *Columbian* case cannot be gainsaid:

> "This is not a contest of the policy, but a prayer to make a written instrument speak the real agreement of the parties. It would hardly be suggested that an assured, who brings an action to reform a policy and to recover under it as reformed, was contesting the policy within the meaning of this clause. Yet the clause is not one-sided, and the right of the assured to have the writing express the agreement actually made is no greater than the right of the assurer." (35 Fed.2d 577)

We naively suggest that the purpose of courts of law and equity is to promulgate or at least recognize and apply principles which will promote justice and fairness. That the rule announced in the *Richardson* case can serve only to subvert such purpose is forcefully pointed out by the Supreme Court of Washington in the *Buck* case:

> "The provision in the policy that it should be indisputable after one year as to the amount due avails naught to respondent. The appellant is not attempting to dispute the policy nor prevent a recovery thereon. It is simply contesting as to the amount due thereon. 'The amount due' in the language of this clause can

mean no other sum than the amount due in law and fact. Appellant is seeking, not to avoid the payment of this amount, but to have the policy truthfully express the amount correctly due. The vice of respondent's contention that the amount written in the policy is incontestable after one year is shown by a simple illustration. Suppose that, instead of writing the amount correctly as $408, the decimal point had been omitted and the amount read $40800. No one would have the hardihood to contend that in case of non-discovery of the mistake until after the lapse of one year appellant would be bound to pay such sum to respondent and was forever barred both in law and fact from contesting the amount shown to be due on the face of the policy." (*Buck v. Equitable Life Assur. Soc. of U. S.,* 165 P. 879)

This court should also bear in mind that if the *Richardson* rule is to stand, it will cut both ways. Should an insured come before this Court to reform a policy and recover under it, he will find it hard to appreciate the logic which compels him to accept $20.00 (in accordance with the written policy) when it was intended that he should receive $2000. We quote in part a wholly disinterested note relative to the *Richardson* case found in 62 Harvard Law Review 890:

"Prior to the decision in the instant case it had generally been held that the incontestable clause was not a bar to reformation if the insurer would have been otherwise entitled to a decree. E.g., *Columbian Nat. Life Ins. Co. v. Black,* 35 F.2d 571 (10th Cir. 1929). See I Appleman, Insurance Law and Practice, 402 (1941). The clause, required by statute in many states, is designed to protect the policyholder from a

lawsuit contesting the validity of the policy after considerable time has passed and evidence of the facts surrounding the purchase may be unavailable.

To effectuate this purpose it has been held that the incontestable clause prohibits the insurer from raising the defense of misrepresentation after the specified period. E.g., *Mutual Life Ins. Co. of N. Y. v. Heilbronner,* 116 F.2d 855 (8th Cir. 1941) *cert. denied,* 312 U.S. 707 (1941); *Berkshire Life Ins. Co. v. Weining,* 290 N.Y. 6, 47 N.E.2d 418 (1943). The court in the principal case relies on these decisions in reaching its result. But the incontestable clause has been held not to bar litigation on the extent of the risk covered by the contract. E.g., *Burns v. Mutual Benefit Life Ins. Co. of Newark,* 79 F. Supp. 847 (W.D. Mich. 1948). A reformation of the policy to conform with the terms of the agreement seems more closely analogous to the latter cases than to those in which the insurer contests the validity of the contract on the ground of fraud. Protection of the policyholder does not require that reformation for mistake be denied, since he will receive all the benefits for which premiums have been paid. Furthermore, allowing benefits incommensurate with the premiums paid is contrary to the well recognized policy, often enforced by statute, against discrimination among insurance purchasers of the same class. *Young v. Metropolitan Life Ins. Co.,* 28 Ohio N.P. (N.S.) 179 (1930)."

The note found in Vol. 97, No. 5 (April 1949) University of Pennsylvania Law Review 741, with respect to the *Richardson* case is well worth consideration. We quote:

"The purpose behind incontestability clauses is to assure certainty of the insurer's liability and thus

promote the security and repose function of life insurance. Consistent with such purpose, courts have reasoned that inasmuch as insurers have a reasonable time to investigate and ascertain the facts, they assume the risk of waiving invalidating defects. So also it is argued that the incontestability clause must refer to the terms of the policy as written since otherwise the insured would be deprived of the very confidence which such clauses were intended to instill. Such reasoning, although pertinent to defenses such as fraud, does not seem applicable in the case of mutual mistake since it fails to recognize the substantial difference in the effect of the two types of defenses. The former result in rescission and total avoidance of liability; the latter, in reformation and assurance of liability. Reformation effectuates the real agreement and, consistent with the reason for the clause, gives the insured the security requested. Furthermore, even if the parties can be said to have relied on the writing, which seems questionable if the mistake is mutual, they will not be prejudiced since they are getting the fund paid for and are deprived only of a windfall. In overlooking these factors, the court seems to have extended the scope of incontestability clauses beyond that anticipated by either the insured or the insurer."

This Court should not lose sight of the fact that in the *Richardson* case it was attempting to determine and apply the law of California and that it based its decision upon California precedent. Here we are concerned with the law of Arizona. If we advert to decisions of the Supreme Court of Arizona we find that instruments, including insurance policies, will be reformed for mutual mistake,

Northwestern Nat. Ins. Co. v. Chambers, 24 Ariz. 86, 206 P. 1081;

Korrick v. Tuller, 42 Ariz. 493, 27 P.2d 529;

and that an incontestable clause has application only to a contest as to the validity of a policy, not to the extent of coverage.

Posner v. New York Life Ins. Co., 56 Ariz. 202, 106 P.2d 488.

In the *Posner* case the court stated:

> "We then consider whether the incontestability clause of the policy barred any effort to show a pre-existing disease. It must be observed that the defense was not that the policy was *invalid* because of previous existing disease, but that the disability claimed by plaintiff was not covered by the terms of the policy. * * * The incontestability clause did not apply to the situation." (106 P.2d 492) (Emphasis supplied).

In this action we are attempting to ascertain the extent of the risk covered by the agreement made by the parties, namely whether or not death through aerial flight is a risk covered by the policy. The validity of such agreement is not questioned.

If this Court should adhere to the *Richardson* rule as expressing the law of California, there is, nevertheless, no basis—in the face of Arizona authorities cited—for assuming that such rule prevails in Arizona. We respectfully submit that the *Richardson* rule is not sound, that it can only be deemed to be an expression of California law, that in the light of Arizona precedent it must be deemed that the *Columbian* rule accurately reflects the law of Arizona.

C. PROVISION THAT POLICY CONSTITUTES ENTIRE CONTRACT DOES NOT PRECLUDE REFORMATION.

We have discussed hereinabove the contention that a provision, included in a life insurance policy pursuant to statute, to the effect that the policy constitutes the entire contract precludes reformation. We have found that it does not.

American Merchant Marine Ins. Co. v. Tremaine, C.C.A. 9, 269 Fed. 377;

City of Lawrenceburg v. Maryland Casualty Co., 16 Tenn. A. 238, 64 S.W.2d 69;

North Carolina Mut. Life Ins. Co. v. Martin, 223 Ala. 104, 134 S. 850.

D. REFORMATION DEMANDED BY MUTUAL MISTAKE.

Appellants vaguely suggest that the record does not support the conclusion of mutual mistake. We submit that there could not be a clearer case than this demanding reformation on that ground. After the lapse of the policy insured applied for reinstatement and disclosed that he intended to engage in military aviation (R. 18, 19, 42). Appellee indicated that reinstatement would be made only upon exclusion of double indemnity benefits and inclusion of the aviation clause (R. 42-47). Insured then requested in writing that the policy be reinstated as suggested (R. 20, 24, 42) with inclusion of the aviation clause. Upon reinstatement the double indemnity clause was deleted but through clerical error the aviation clause was not endorsed upon the policy (R. 46). That reformation will be granted under such circumstances is well settled by the case of *Flimin's Adm'x. v. Metropolitan Life Ins. Co.*, 255 Ky. 621, 75 S.W.2d 207 and the numerous authorities cited therein.

III.

Appellee Was Entitled to Summary Judgment

A. NO GENUINE ISSUE AS TO ANY MATERIAL FACT.

Rule 56(c) of the Rules of Civil Procedure with respect to summary judgment states:

> * * *"The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In this case, as we pointed out hereinabove, the pleadings, affidavits and depositions on file disclosed the non-existence of a genuine issue as to any material fact. The records of the War Department authenticated by the deposition of Major Clark Marshall show that insured's death resulted from injuries which he sustained in the crash of an airplane which he was piloting (R. 89-94, 100, 101, 104). These records are *prima facie* evidence of the facts therein stated. 28 U.S.C.A. 1733, 1734.

Gilmore v. U. S., C.C.A. 5, 93 Fed.2d 774;
Taylor v. Latimer, 47 Fed. Supp. 236;
Thatenhorst v. U. S., C.C.A. 10, 119 Fed.2d 567;
Joy v. Joy, Tex. Civ. App., 156 S.W.2d 547;
Mitchell v. City of Mobile, 244 Ala. 442, 13 S.2d 664;
Weis v. Weis, 147 Ohio S. 416, 72 N.E.2d 245.

The affidavit of Frank Schiel, Sr. filed by appellants (R. 62) is not entitled to consideration because wholly hearsay. Rule 56(c) of the Rules of Civil Procedure.

The District Court was more than justified in concluding that in the event of trial the *prima facie* case established by the War Department records could not be rebutted and that, therefore, there was no genuine issue as to any material fact for determination upon a trial. It was for situations such as this that the Rules of Civil Procedure provide for summary judgment.

Wilkinson v. Powell, C.C.A. 5, 149 Fed.2d 335.

B. DEATH ARISING FROM MILITARY SERVICE DOES NOT PRECLUDE APPLICATION OF AVIATION CLAUSE.

Appellants take the position that because the policy included a clause to the effect that it is free of conditions as to military and naval service, the aviation clause must be limited to death arising from civilian aviation. They insist that there is ambiguity between the two clauses and that such ambiguity will be resolved in favor of the insured.

In this case there can be no ambiguity between the military clause and the aviation clause. The former was contained in the policy when issued. The latter was added by reformation as of the time of reinstatement. It reads:

> "*Anything in this Policy to the contrary notwithstanding, the death of the Insured as a result directly or indirectly from operating or riding in any kind of aircraft,* whether as a passenger or otherwise, other than as a fare-paying passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and operated by a licensed pilot on a regular passenger route between definitely established airports, is a risk not assumed under this Policy, but upon receipt of due proof of the death of the Insured, as a result directly or indirectly from operating or

riding in any kind of aircraft, whether as a passenger or otherwise (other than as a fare-paying passenger as defined above) the Company will pay to the beneficiary in lieu of the amounts provided in this Policy, the reserve on the face amount of this Policy at the date of death, and the reserve on any outstanding dividend additions, and any outstanding dividends, including dividend deposits, less any indebtedness to the Company against this Policy." (R. 23) (Emphasis supplied.)

The first phrase of the clause disposes of any charge of ambiguity. In the light of such language the clause will override anything to the contrary that might be contained in the policy. Even in the absence of such language it is clear that the addition of the clause subsequent to the original issuance of the policy requires that the latest expression of the intent of the parties shall control.

In determining whether or not the death of insured while operating a military plane was excluded as a risk, we need not and can not look beyond the terms of the aviation clause. The clause includes the term "any kind of aircraft." It cannot be argued that this term excludes civilian, military or any other type of aircraft—it is all-embracive. In view of the fact that the insured was not riding as a passenger on a licensed airline—within the exception contained in the aviation clause—there is no room for contending that insured's beneficiaries are entitled to receive any more than the reserve on the policy.

A number of courts have had occasion to pass upon the question of whether or not an aviation clause, similar to that involved in this action, will preclude recovery of the full amount of the policy where death results from partici-

pation in military or naval aviation. They have held with substantial unanimity that such clause does preclude recovery in the event of death in such manner.

Green v. Mutual Ben. Life Ins. Co., C.C.A. 1, 144 Fed.2d 55;

Hyfer v. Metropolitan Life Ins. Co., 18 Mass. 175, 61 N.E.2d 3;

Knouse v. Equitable Life Assur. Co. of Iowa, 163 Kan. 213, 181 P.2d 310;

McKanna v. Continental Assur. Co., 165 Kan. 289, 194 P.2d 515;

Wilmington Trust Co. v. Mutual Life Ins. Co., D.C. Del. 76 Fed. Supp. 560;

Burns v. Mutual Ben. Life Ins. Co., D.C. Mich. 79 Fed. Supp. 847;

Thoma v. New York Life Ins. Co., 30 Northam. Law Rep. Pa. 369;

Barringer v. Prudential Ins. Co., D.C. Pa. 62 Fed. Supp. 286, aff'd 153 Fed.2d 224.

As pointed out in the *Burns* case, the decisions in *Boye v. United States Service Life Ins. Co.,* C.C.A. D.C., 168 Fed.2d 570, and *Bull v. Sun Life Assur. Co.,* C.C.A. 7, 141 Fed.2d 456, cert. den. 323 U.S. 723, which are cited by appellants, do not support a contrary conclusion. In the *Bull* case the insured had landed a sea plane; it was disabled and he was trying to inflate a rubber boat for the purpose of escape when he was fatally injured during strafing from a Japanese plane. The court correctly concluded that insured's death resulted from gunshots rather than from aviation. In the *Boye* case the court reached the same conclusion by reason of the lack of any evidence

indicating that the insured's death resulted from other than gun fire. In the case at bar death of the insured was directly caused by the crash of his plane and resulting skull fracture.

CONCLUSION

We respectfully submit that the judgment of reformation was final and is not subject to review at this time. In any event reformation was properly allowed in the application of equitable principles implicit in the law of Arizona. There is nothing in the record to indicate that the *prima facie* effect of the war department records—disclosing death within the terms of the aviation clause—could be rebutted upon a trial. Idle speculation as to any other possible cause of death cannot destroy the probative effect of the facts established by the records and the reasonable inference flowing therefrom.

Barringer v. Prudential Ins. Co. (D.C. Pa.), 62 Fed. Supp. 286, aff'd 153 Fed.2d 224.

The district court was justified in concluding that there was no genuine issue as to any material fact and that summary judgment was demanded as a matter of law.

Respectfully submitted,

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